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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC., PETITIONERS

v.

CLARK-CONGRESS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The district court did not write an opinion. Its findings of facts and conclusions of law are set out in the record at pp. 1077–1088 and in the appendix to the petition at pp. 47–60. The opinion of the Court of Appeals (Pet. App. 71–87) is reported at 219 F. 2d 90.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1955 (Pet. App. 89). A petition for rehearing was denied on February

23, 1955 (Pet. App. 91) and the petition for a writ of certiorari was filed on April 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in this proceeding by the United States to condemn space in an office building, the court below correctly held that the owner's motion to strike cross-claims and a counterclaim by its tenants for recovery against the owner should have been sustained because (a) the damages to the tenants flowed from the acquisition by the United States, not from acts of the owner, (b) the damages, being moving expenses, are not compensable and (c) there is no jurisdiction to try such claims in a condemnation proceedings.

STATEMENT

The United States instituted proceedings to condemn for a term of years space in the Rand McNally Building in Chicago, Illinois, to house the Bureau of Public Debt. The defendants were Clark-Congress Corporation, the owner of the building, and petitioners who were tenants for terms less than the term taken [1] (R. 7–9, 108–109). In their answers to the condemnation complaint, petitioners included allegations, designated variously as a "Cross-Claim" and a "Counter-

[1] It was stipulated that Intertype's leasehold, although longer than the term taken by the United States, was totally destroyed by the taking (R. 108–109).

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Claim", seeking recovery against Clark-Congress for damages resulting from loss of their leases (R. 39–42, 44–46, 55–59). A judgment in condemnation was entered awarding just compensation against the United States (R. 618). Judgments were also entered allowing petitioners recovery against Clark-Congress on their cross-claims (R. 1088–1090). The United States and Clark-Congress appealed from the judgments relative to each. In addition, the United States appeared as *amicus curiae* in the Clark-Congress appeals. The Court of Appeals handed down a single opinion and two judgments reversing in both appeals (Pet. App. 71–90). Petitioners have now applied to this Court, in a single petition, for a writ of certiorari to review both judgments below. The Government is filing a brief in opposition with respect to the condemnation judgment to which it is a party. This brief, as *amicus curiae,* relates only to the cross-claims against Clark-Congress.

On June 22, 1951, Clark-Congress executed a lease of the building to the United States (R. 81–93). The lease stated that it was "entered into by the parties in lieu of condemnation proceedings or an award therein, the Government having indicated that it was considering instituting condemnation proceedings to acquire the rights herein granted" and, in the event "that the Government should institute any condemnation proceedings, in order to obtain possession of any premises

hereby demised, it is agreed by and between the parties that this lease agrement may be introduced in evidence as a stipulation between the parties hereto and any award not inconsistent therewith may be entered" (R. 92).

The lease was to commence as to the vacant part of the building on August 1, 1951 (R. 81). Additional space was to be leased to the Government as it became available (R. 82). The entire building was leased from January 1, 1952, to December 31, 1956, subject, however, to then existing tenancies whose rentals should be paid to the Government (R. 82, 88–89). Clark-Congress agreed to cooperate with the Government to secure cancellation or termination of existing tenancies (R. 91). The Government assumed responsibility for any loss, liability or expense resulting from such action (R. 91). Article 24 provided (R. 92):

> It is understood and agreed between the parties that this lease and any premises hereby demised are subject to any and all existing rights of occupancy of tenants under existing leases (including Rand McNally & Company under the new lease) and that the Lessor makes no representations, assumes no responsibility and makes no guarantees whatsoever with respect to the right of the Government to take or acquire possession of any of the demised premises but the Government assumes all responsibility with respect thereto. The Government further

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> assumes all responsibility for any claims or causes of action of any such existing tenants which may arise out of any proceedings or action, whether through condemnation or otherwise, whether against the Lessor or others, to acquire possession of any premises in the building or hereby demised or to terminate or bring to an end any existing tenancies under any existing leases.

Petitioners were notified on the date of the lease that the Government would require their space "at the earliest practical date" (R. 19, 584, 599, 987). Almost all of the tenants in the building vacated in the summer and fall of 1951 and work proceeded on the alterations to suit the needs of the Government. The present proceedings were instituted by complaint (and declaration of taking) filed on December 12, 1951, to condemn the right to use the space occupied by petitioners (R. 7–9). A claim of The Advertising Checking Bureau, Inc., seeking compensation from the United States was rejected on motion for summary judgment because its lease contained a condemnation clause and that judgment was affirmed. *United States* v. *Advertising Checking Bureau, Inc.*, 204 F. 2d 770 (C. A. 7). That decision also rejected the contention that the proceedings were not authorized. Judgment awarding the other two tenants compensation totalling $131,500 for Intertype and $43,750 for Merchants was entered after a jury trial (R. 618). The claim of Clark-

Congress was settled in accordance with the terms of the lease.

Thereafter, petitioners' cross-claims came on for hearing. Motions to strike these portions of the answers were denied (R. 66–69, 94–96). The court's findings contain the following: After the lease to the Government and before the date of taking, Clark-Congress permitted agents of the Government to enter the building and, in making alterations, to create disturbance and interference with the normal operations of the building (Pet. App. 48–49; R. 1078–1079). Except for the collaboration of Clark-Congress, "the Government would not have been in position to commence and carry on alterations and reconstruction of the building in October, November and December of 1951" (Pet. App. 50; R. 1080). The "failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against, the actions of the Government in the alteration and reconstruction work, and the letters from the General Services Administration demanding that the tenants * * * remove from the building, was a breach of the landlord's duty of furnishing to its tenants under the continuing leases protection against interference and disturbance by third parties of their tenancies" (Pet. App. 50–51; R. 1080). Finding 14 states (Pet. App. 51–52; R. 1081):

> In connection with this cooperative effort, to rid the building of its tenants it was

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> contemplated, as shown by the lease of June 22, 1951, that if necessary the Government would use its powers of eminent domain as against recalcitrant tenants and Clark-Congress Corporation, in signing said lease, authorized and acquiesced in the use of condemnation proceedings against its tenants if such was necessary to secure actual possession.

The damages were found to be $44,027.91 for Merchants, representing the cost of moving and related items; $41,498.98 for Intertype, composed of the same elements; and $96,949.78 for Advertising which, in addition to similar items of moving costs, included the fair market value of its leasehold above rent reserved (Pet. App. 53–55; R. 1083–1084).

The court concluded that in affording the Government access to the building, etc., there was an unlawful breach of the landlord's duty to accord the tenants quiet enjoyment of their spaces and that the landlord's failure "to interfere with, complain about, or protect the tenants against the actions of the Government, and the letters from the General Services Administration" was a breach of its duties, as was its action in permitting the Government "to approach, negotiate with and make demands for possession on tenants" (Pet. App. 57–58; R. 1086–1087). It stated that when the landlord authorized one tenant to do acts injuring other tenants, there was a con-

structive eviction (Pet. App. 57; R. 1086). The court ruled that each tenant is entitled to recover the amount it was damaged because of those "wrongful acts of Clark-Congress" (Pet. App. 59; R. 1087–1088) and judgments were entered awarding the foregoing amounts (R. 1088–1090).[2]

On appeal by Clark-Congress, the Court of Appeals reversed with directions to sustain the motions to strike petitioners' cross-claims and counterclaim (Pet. App. 87). It held that the lease, rather than being a plot against petitioners, was an appropriate consensual transaction in connection with condemnation proceedings, that petitioners' "attempts to isolate some fragment of the total acquisition process carries compensation beyond the bounds delineated in the Fifth Amendment", and that "these three tenants cannot improve on the amount of compensation by taking

[2] The court said that the damage suffered by each tenant included "the fair market value of their respective leases as of the date of constructive eviction for the remainder of the term over and above the rent reserved" (Pet. App. 59; R. 1087). The date of that "eviction" as to Advertising was held to be November 10, 1951, and it alone was awarded the fair market value mentioned (Pet. App. 59; R. 1087–1088). The court stated that as to the other petitioners those values have previously been awarded by the jury in the condemnation case (Pet. App. 59; R. 1088). No date of "constructive eviction" by Clark-Congress was stated for those petitioners. By orders of the court, contrary to a motion by the Government for immediate possession, Advertising and Merchants were granted possession until May 31, 1952, and Intertype until January 31, 1952 (R. 36–37). Title passed to the Government on December 12, 1951 (R. 9).

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damages from their landlord * * * for moving, packing and other expenses" (Pet. App. 81, 83).

ARGUMENT

This case presents no question calling for review by this Court. There is no conflict of decisions. The decision of the Court of Appeals reversing the judgments of the district court is correct.

Petitioners assert (Pet. 16–18) that the court below exceeded its power in that it set aside the trial court's findings of fact by holding that those findings "are estranged from significant items of evidence" and "flow from errors of law" (Pet. App. 83–84). The significant items of evidence, which establish that the presence of most of the findings resulted from errors of law, are (a) that both the lease, as its terms show, and the condemnation of petitioners' interests were parts of the same total acquisition process by the United States to obtain property for a public purpose and (b) that petitioners' losses, outside the condemnation judgment, are the "costs of moving out."

The court's use of those items, petitioners complain (Pet. 14, 24, 30), erroneously led to applying decisions in eminent domain cases, instead of Illinois landlord-and-tenant law, to their rights with respect to Clark-Congress and thereby cloaked a private-property owner with the immunity of the sovereign. The contention is with-

out merit. The actions causing petitioners' losses were by the United States under the eminent domain power, not by Clark-Congress as landlord. The Government required this building to house the Bureau of Public Debt. It approached the owner, Clark-Congress, to acquire the property by negotiation and agreement. The Government's power to acquire property may be exercised in this manner. Condemnation litigation is not required to bring the transaction within the acquisition process. As the lease shows, the lease agreement was "in lieu of condemnation proceedings or an award therein" (App. 74). Clark-Congress was subsequently a defendant in the condemnation. Petitioners were notified on the date of the lease that the Government would take their space (R. 19, 584, 599, 987). Thus, the lease and subsequent activities were part of the acquisition by the Government which culminated in the condemnation proceedings.

Clark-Congress, like each petitioner, was merely a potential condemnee. The lease constituted a settlement with the building owner as to its claim relating both to empty space and to space occupied by tenants. Sensible administration requires that amicable arrangements be made with as many parties as possible, particularly when the taking involves a building containing numerous tenants. This procedure is customarily followed. See, e. g., *United States* v. *Petty Motor Co.*, 327 U. S. 372, 374; *United States* v. *425,031 Square Feet in*

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Jersey City, 187 F. 2d 798 (C. A. 3); *United States* v. *576.734 Acres of Land, Etc.,* 143 F. 2d 408 (C. A. 4), certiorari denied, 323 U. S. 716; *Messer* v. *United States,* 157 F. 2d 793 (C. A. 5); *Southern California Fisherman's Assn.* v. *United States,* 174 F. 2d 739 (C. A. 9).

The assertion in the district court's findings (Pet. App. 50; R. 1080) that a landlord is under an affirmative duty "to interfere with, complain about, or protect the tenants against" the actions of the Government in the exercise of its sovereign powers unreasonably limits the right of the landlord and the Government to settle claims without protracted litigation. Similarly erroneous is the conclusion (Pet. App. 58; R. 1087) that permitting the Government "to approach, negotiate with and make demands for possession of tenants having unexpired leases" was wrongful. The policy of the law so strongly favors amicable settlement in this field that the statutes of many states, including Illinois, impose an attempt to purchase as a condition precedent to condemnation. The federal authority to condemn is not so limited (*United States* v. *Meyer,* 113 F. 2d 387, 394 (C. A. 7), certiorari denied, 311 U. S. 706) but certainly it is not wrongful to follow that policy.

The circumstance, relied on by petitioners (Pet. 29), that the lease with Clark-Congress was executed prior to institution of condemnation proceedings is irrelevant. Thus, in *Woodville, Okla.*

v. *United States,* 152 F. 2d 735 (C. A. 10), certiorari denied, 328 U. S. 842, a claim arising from the taking of a railroad right of way was settled prior to the institution of condemnation proceedings against the city. Thereupon, the city claimed compensation for the land in the right of way on the theory that there had been a reverter by abandonment of use for railroad purposes. This was rejected, the court stating (p. 738):

> All the steps necessary to effectuate the purposes of the act authorizing the construction of this project must be viewed as one proceeding. While the government acquired the various pieces of property, including the tract in question, by contract with the respective owners, and at different times, the respective rights and interests of all the parties must be considered as though the government had proceeded against all of them in a single condemnation proceeding.

See also *Scott* v. *United States,* 146 F. 2d 131 (C. A. 5). A distinction between settlements made before and after institution of condemnation proceedings would be purely formal and would require, without just cause, the United States to institute proceedings which might be entirely unnecessary. Neither the time of taking nor the amount of compensation is determined by the institution of proceedings.

The assertion in the district court's findings (Pet. App. 50; R. 1080) that except for the "col-

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laboration and cooperation of Clark-Congress Corporation in entering into the lease of June 22, 1951 * * *" the Government would not have been able to carry on alteration of the building in the fall of 1951, misconceives the sovereign authority to acquire property. The eminent domain power is frequently exercised simply by the physical taking of property, leaving the landowner to his remedy under the Tucker Act. *United States* v. *Causby,* 328 U. S. 256; *United States* v. *Dickinson,* 331 U. S. 745; *Campbell* v. *United States,* 266 U. S. 368. Such acts of government agents which, if performed by private persons might constitute a trespass, are not wrongful and may not be enjoined. *Hurley* v. *Kincaid,* 285 U. S. 95; *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 21; *United States* v. *Meyer,* 113 F. 2d 387 (C. A. 7). Thus, here, if the activities of the agents of the United States resulted in eviction of the tenants from the building, the result would be a taking under the power of eminent domain. Clark-Congress would not be liable.

There was not, however, such an eviction before the institution of these proceedings and the concurrent filing of the declaration of taking on December 12, 1951. By orders of the district court, all these tenants retained possession long after that date from which compensation was computed and awarded in the condemnation judgment (R. 9, 36–37; footnote 2, *supra,* p. 8). Therefore, the theory of an award based on

"constructive eviction" was error. It affords no basis for awarding Advertising in this proceeding what it was not entitled to receive in the condemnation judgment.

All other items in the three judgments are composed entirely of moving expenses (Pet. App. 53–54; R. 1083–1084). Moving expenses of a tenant whose entire term is taken are not compensable under the Fifth Amendment. *United States* v. *Petty Motor Co.*, 327 U. S. 372. The measure of compensation is the same whether a taking is by physical action or by means of condemnation proceedings. *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396.[3]

[3] Although the court below reluctantly held to the contrary (Pet. App. 75–81), we contend that its judgment, sustaining the motion of Clark-Congress to strike petitioner's crossclaims and counterclaim, can also be sustained on the ground that the district court lacked jurisdiction to hear such claims in a condemnation action. Rule 71A (a) of the Federal Rules of Civil Procedure, relating to condemnation, states that the Rules of Civil Procedure "govern the procedure" for condemnation "except as otherwise provided in this rule." Rule 71A (e) provides for the filing of an answer. It also provides: "No other pleading or motion asserting any additional defense or objection shall be allowed." Since the condemnation rule is specific as to the matters which may be put in issue, there is no authority for resort to other rules to inject collateral issues into a condemnation case. *United States* v. *76.15 Acres of Land, Etc.*, 103 F. Supp. 478 (N. D. Cal.); see also *United States* v. *534.7 Acres of Land*, 157 F. 2d 828 (C. A. 5).

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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